STATE OF MICHIGAN

COURT OF APPEALS

AUTOMOTIVE REPAIR MANAGEMENT, INC.,	UNPUBLISHED September 27, 2011
Plaintiff-Appellant,	
v	No. 298109 Ottawa Circuit Court LC No. 08-062829-CK
JONATHAN STELLEMA, YATEER CORPORATION, and THE TEC-SERV CORP.,	
Defendants-Appellees.	

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Plaintiff Automotive Repair Management, Inc. appeals as of right the trial court's judgment of no cause of action in favor of defendants Jonathan Stellema, Yateer Corporation, and The Tec-Serv Corp.[1] Plaintiff argues that the trial court erred by granting summary disposition in defendants' favor on counts II, III, and IV of the complaint and count I of the counter-complaint, and denying plaintiff's motion for judgment based on defendants' discovery violations. Plaintiff also contends that the trial court erred by ruling in defendant's favor on the remaining counts following a three-day bench trial. We affirm.

This action arises from a dispute between plaintiff and defendants regarding sublease agreements for two Auto-Lab franchises, automobile repair facilities, located in Jenison and Grand Rapids. Plaintiff entered into lease agreements with Marathon Oil Corporation for the properties, and the lease agreements were incorporated by reference in plaintiff's subsequent sublease agreements with defendants. Yateer vacated the Grand Rapids property before the termination of the sublease on February 28, 2007, but Tec-Serv continued to occupy the Jenison property after the sublease terminated. A conflict developed between the parties regarding provisions of the sublease agreements.

Plaintiff first argues that the trial court erred by granting summary disposition of count II (breach of contract against Yateer and defendant as to the Grand Rapids property), count III

[1] Stellema owns Yateer and Tec-Serv. The term "defendant" in the singular refers to Stellema.

(tortious interference with a business expectancy), and count IV (silent fraud) of the complaint, and count I of the counter-complaint, concerning return of the security deposit for the Grand Rapids property. We disagree. We review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden*, 461 Mich at 120. Parties opposing a motion for summary disposition must present more than mere conjecture and speculation. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

Plaintiff failed to establish that there were any genuine issues of material fact concerning count II. Plaintiff is precluded on appeal from arguing that there was an issue of fact concerning whether Yateer held over at the Grand Rapids property beyond the sublease termination date because it is contrary to the position plaintiff took at the summary disposition hearing and at trial. See *Living Alternatives for Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994) (stating that a "party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court").

Plaintiff also did not demonstrate that there was a genuine issue of material fact concerning count III. In *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996), we outlined the elements of tortious interference with a business expectancy as follows:

> The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.

For tortious interference with a business expectancy, the plaintiff "must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading [the] plaintiff's . . . business relationship." *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984). Plaintiff did not present evidence that there was an intentional interference by defendant before January 2007 when it explicitly authorized direct communication between Marathon and defendant that induced or caused a breach or termination of a business relationship or expectancy. Plaintiff's contention that defendant was secretly negotiating with Marathon before January 2007 was based on speculation and mere conjecture, which was insufficient to overcome summary disposition. See *Libralter Plastics, Inc*, 199 Mich App at 486. Furthermore, plaintiff did not demonstrate "with specificity, affirmative acts by [defendant] which corroborate[d] the unlawful purpose of the interference." *Feldman*, 138 Mich App at 369-370.

Additionally, there were no genuine issues of material fact raised as to count IV. "In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure." *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313

NW2d 77 (1981). Although plaintiff argued that defendants had a duty to disclose that they were pursuing other lease options, plaintiff provided no support for this position. The relationship between plaintiff and defendants was governed by contract, and the subleases did not impose such a duty. Without establishing that such duty existed, plaintiff could not demonstrate that there was a genuine issue of material fact as to whether any suppression of information by defendants constituted silent fraud. See *id*.; *M&D, Inc v WB McConkey*, 231 Mich App 22, 30; 585 NW2d 33 (1998).

As to count I of the counter-complaint, plaintiff's only contention is that its affirmative defenses are deemed admitted because defendants failed to timely respond to them. "[A]ffirmative defenses are not pleadings requiring a response under MCR 2.110(A) and (B)," and "affirmative defenses are to be taken as denied even if a demand for a response has been made." *McCracken v Detroit*, __ Mich App __; __ NW2d __ (Docket No. 294218, issued February 8, 2011), slip op p 1. Thus, plaintiff's argument is without merit. As previously discussed, plaintiff cannot take a position contrary to its position in the trial court that Yateer did not hold over at the Grand Rapids property. See *Living Alternatives for Developmentally Disabled, Inc*, 207 Mich App at 484. Plaintiff does not claim that there were damages to the premises or that there was another legitimate basis for retaining Yateer's security deposit. Accordingly, the trial court properly granted summary disposition of the counter claim for the security deposit in favor of defendants.

Next, plaintiff argues that the trial court erred by denying its motion for judgment against defendants based on discovery violations. We disagree. "We review discovery sanctions for an abuse of discretion." *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). An abuse of discretion is not simply a matter of a difference in judicial opinion; it occurs only when the trial court's decision was outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Under MCR 2.504(B)(1), on the motion of a party or sua sponte, the trial court may enter a default or dismiss an action for a party's failure to comply with a court order or court rules. Under MCR 2.313(B)(2), if a party "fails to obey an order to provide or permit discovery" the trial court "may order such sanctions as are just . . . ." In *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (citations omitted), we delineated the factors that should be considered in determining the appropriate sanctions for discovery violations as follows:

> (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [non-offending party]; (4) actual notice to the [non-offending party] of the witness and the length of time prior to trial that the [non-offending party] received such actual notice; (5) whether there exists a history of [the offending party] engaging in deliberate delay; (6) the degree of compliance by the [offending party] with other provisions of the court's order; (7) an attempt by the [offending party] to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice.

"The sanction of a default judgment should be used only when there has been a flagrant and wanton refusal to facilitate discovery." *Thorne*, 206 Mich App at 633. "The court should evaluate other options before concluding that a drastic sanction is warranted." *Id*.

The trial court did not abuse its discretion by barring the admission of evidence at trial and awarding costs and attorney fees as sanctions for discovery violations rather than entering judgment in favor of plaintiff. The trial court found that defendants did not properly disclose an invoice from plaintiff to Tec-Serv and recordings of telephone conversations between defendant and plaintiff's employees that defendant secretly recorded. Defendant produced transcripts of the telephone conversations in an untimely manner. The trial court imposed sanctions for discovery violations rather than contempt sanctions for violation of an order to compel. In this case, plaintiff had not filed any motions to compel. Plaintiff was not prejudiced by the non-disclosure of the invoice because it presumably created that invoice and sent it to defendants. Plaintiff was also not prejudiced by defendants' failure to produce the telephone conversation recordings. Although they were untimely, defendants revealed the existence of the recordings and provided plaintiff with transcripts of the recordings before trial. Plaintiff thereafter did not use this evidence at trial. There was no history of defendants engaging in deliberate delay, and plaintiff's allegations that defendants withheld other documents have no evidentiary support. The trial court recognized that there had been discovery violation issues raised in regard to both parties throughout the proceedings, and it found that the harshest sanction of entering a judgment for plaintiff was not the most appropriate choice under the circumstances. On this record, exclusion of evidence and award of costs and attorney fees was not outside the range of principled and reasonable outcomes. See *Saffian*, 477 Mich at 12.

Finally, plaintiff argues that the trial court erred in interpreting the Jenison sublease agreement and entering a judgment of no cause of action in favor of defendants because, at the very least, there was a mutual mistake warranting reformation of the contract. We disagree. The proper interpretation of contracts concerns questions of law that we review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

"The primary goal in interpreting contracts is to determine and enforce the parties' intent. To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (citation omitted). "Parties are presumed to understand and intend what the language employed clearly states." *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005). "If the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "In ascertaining the meaning of a contract, [this Court] give[s] the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

The plain language of the sublease reveals the intent of the parties. See *Rory*, 473 Mich at 464 n 21; *Old Kent Bank*, 243 Mich App at 63. The lease provision, incorporated by reference in the sublease, states that the "Landlord shall notify Tenant, in writing, within ten (10) days

after the Termination Date as to which option Landlord shall choose to exercise" is clear and unambiguous. See *New Amsterdam Cas Co*, 374 Mich at 342. Because the provision is unambiguous, it must be enforced as written. See *Chestonia Twp*, 266 Mich App at 432. Defendants did not waive their right to the notice within ten days after the sublease termination date by any of its written correspondence to plaintiff. The evidence presented at trial established that plaintiff did not provide written notice to defendants within ten days of the sublease termination date as required.

Plaintiff argues in the alternative that reformation of the sublease was warranted because of a mutual mistake of the parties regarding the 200 percent rent contract provision. "To obtain reformation, a plaintiff must prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). The correspondence between the parties merely indicated that defendant did not want plaintiff to charge 200 percent rent, defendant's testimony at trial was that plaintiff did not invoke the 200 percent rent provision, and Tec-Serv never paid 200 percent rent after the ten-day period despite plaintiff's demands. Accordingly, plaintiff failed to prove by clear and convincing evidence that there was mutual mistake that the parties believed that plaintiff could charge 200 percent at any time. Even if there had been a mutual mistake, there was no evidence that the sublease was not drawn as intended by the parties, and a mistake regarding the 200 percent rent provision would have been a mistake of law regarding the legal effect of the provision, which would not warrant reformation. See *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995).

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering